UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

2012 MSPB 129

Docket No. DE-0752-11-0442-I-1

Jodie Loredo,

Appellant,

v.

Department of the Treasury,

Agency.

November 23, 2012

Jodie Loredo, Ogden, Utah, pro se.

Mikel C. Deimler, Esquire, San Francisco, California, for the agency.

BEFORE

Susan Tsui Grundmann, Chairman
Anne M. Wagner, Vice Chairman
Mark A. Robbins, Member

OPINION AND ORDER

¶1 This case is before the Board on the appellant's petition for review[1] of the initial decision that dismissed her appeal for lack of jurisdiction. For the reasons discussed below, we GRANT the appellant's petition for review and REMAND the case to the regional office for further adjudication in accordance with this Order.

[1] Except as otherwise noted in this decision, we have applied the Board's regulations that became effective November 13, 2012. We note, however, that the petition for review in this case was filed before that date. Even if we considered the petition under the previous version of the Board's regulations, the outcome would be the same.

BACKGROUND

¶2 On October 5, 2010, the appellant's immediate supervisor, Charmian Setear, informed her that the agency had decided to reassign her from her IR-11 Supervisory Clerk position. Initial Appeal File (IAF), Tab 9, Subtab 4 at 100; Hearing Transcript (HT) at 195-96, 326; *see* IAF, Tab 10, Subtab 43 at 291. Setear offered the appellant a lateral reassignment into another management position or a downgrade to a Tax Examiner position.[2] IAF, Tab 9, Subtab 4 at 100; HT at 195, 326. On October 22, 2010, the appellant signed a memorandum stating that she voluntarily requested reassignment from her position in the Accounting Department to a GS-5/6 Tax Examiner position in the Notice Review/Unpostable Department. IAF, Tab 9, Subtab 4.5. She acknowledged that the reassignment was a downgrade and stated the action was voluntary. *Id*. However, on October 27, 2010, the appellant stated her decision to decline the downgrade to a GS-5/6 Tax Examiner position. IAF, Tab 9, Subtab 4.6.

¶3 The agency nevertheless effected the appellant's demotion to a GS-05 Tax Examining Technician position on November 21, 2010. IAF, Tab 10, Subtab 43 at 290. The appellant subsequently filed a formal equal employment opportunity (EEO) complaint in which she asserted that her demotion was involuntary and that the agency had discriminated against her on the basis of her religion and retaliated against her based upon her prior EEO activity. IAF, Tab 9, Subtab 1 at 17-18, Subtab 3 at 91-92. After the agency issued a Final Agency Decision, IAF, Tab 1 at 6-21, the appellant timely filed a Board appeal. *Id*. at 2-5.

¶4 The administrative judge notified the parties of the elements and burdens of proof for establishing Board jurisdiction. IAF, Tab 3 at 2-3. Following a hearing, the administrative judge issued an initial decision that dismissed the

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[2] While the appellant testified that she was concerned that the agency would remove her if she did not accept a different position, it is undisputed that neither Setear nor any other agency official told the appellant she would be fired if she did not accept one of these positions. HT at 346-47.

appellant's involuntary demotion appeal for lack of jurisdiction. IAF, Tab 23, Initial Decision (ID) at 1, 9. The appellant timely filed a petition for review. Petition for Review (PFR) File, Tab 1.

ANALYSIS

¶5 On review, the appellant reiterates her arguments that: (1) the agency's basis for downgrading her—that her subordinates had issues working with her—was false; (2) the agency's offer to reassign her to a lateral position in management would have caused her to be furloughed had she accepted it; and (3) the agency's real reason for its action was religious discrimination due to her Jewish religion. PFR File, Tab 1 at 3-5; IAF, Tab 16 at 3, 6-7. For the following reasons, these arguments provide no basis to disturb the initial decision.

¶6 In the initial decision, the administrative judge addressed the appellant's contention that the agency's stated reason for its action was false. ID at 5-6. The administrative judge noted that one of the appellant's former subordinates, Joyce Nevarez, testified that she had requested to be transferred from the appellant's team due to the appellant's management style. *Id*. at 5. The administrative judge also noted that another of the appellant's former subordinates, Leticia Ponce, testified that she left the appellant's team because it had an unpleasant atmosphere. *Id*. The administrative judge found that Nevarez's and Ponce's testimonies supported the agency's concerns about the appellant's management style. *Id*. The administrative judge's findings are supported by the hearing testimony; accordingly, we discern no reason to disturb them on review. HT at 242-44, 257-60; *see Crosby v. U.S. Postal Service*, 74 M.S.P.R. 98, 106 (1997) (finding no reason to disturb the administrative judge's findings where the administrative judge considered the evidence as a whole, drew appropriate inferences, and made reasoned conclusions); *Broughton v. Department of Health & Human Services*, 33 M.S.P.R. 357, 359 (1987) (same).

¶7 Moreover, we find unpersuasive the appellant's assertion that the real basis for her demotion was religious discrimination. When an appellant raises an allegation of discrimination in connection with a claim of involuntariness, the allegation may be addressed only insofar as it relates to the issue of voluntariness. *Markon v. Department of State*, 71 M.S.P.R. 574, 578 (1996). Thus, evidence of discrimination goes to the ultimate question of coercion, i.e., whether under all of the circumstances, working conditions were made so difficult by the agency that a reasonable person in the employee's position would have felt compelled to request a demotion. *See id*.

¶8 The appellant asserts on review that she was subjected to religious slurs and that her manager subjected her to religious counseling sessions. PFR File, Tab 1 at 4-5. In the initial decision, the administrative judge found that the preponderance of the evidence established that the appellant's second-line supervisor, Steve Bonnemort, made an inappropriate religious comment during a spring 2010 staff meeting. ID at 6. However, the administrative judge found that, contrary to the appellant's allegations, the record did not establish that Bonnemort made a similar remark in September 2010. *Id*. The appellant does not provide a basis to disturb this finding on review. PFR File, Tab 1. Further, the appellant does not present evidence or argument in support of her claim that her manager subjected her to religious counseling sessions other than to state that she was counseled on relating to people of different religions. PFR File, Tab 1 at 4. While the appellant's work environment may have caused her stress, she has not presented sufficient evidence that would establish that a reasonable person would have felt compelled to accept the demotion under the circumstances. *Cf. Miller v. Department of Defense*, 85 M.S.P.R. 310, ¶ 32 (2000) (difficult or unpleasant working conditions are generally not so intolerable as to compel a reasonable person to resign).

¶9 Regarding the appellant's assertion that she accepted the GS-05 Tax Examining Technician position because she would have been furloughed had she

accepted the lateral management position, a choice between unpleasant alternatives does not render a decision to accept the agency's proposal involuntary. *See Soler-Minardo v. Department of Defense*, 92 M.S.P.R. 100, ¶ 9 (2002) (the fact that the appellant was faced with either a demotion or a possible removal did not render her acceptance of the agency's proposal involuntary). Accordingly, the appellant has failed to provide a basis to disturb the administrative judge's finding that the appellant failed to establish a claim of coercion under the standard set forth in *Soler-Minardo*, 92 M.S.P.R. 100, ¶ 6. ID at 7-8.

¶10 However, the appellant's demotion may be found involuntary under another theory. In *Rivas v. U.S. Postal Service*, 57 M.S.P.R. 489 (1993), the Board addressed the issue of when an appellant may withdraw a voluntary demotion request. *Id*. at 493-94. Analogizing to case law concerning withdrawals of resignations and retirements, the Board held that an employee has a right to withdraw an alleged voluntary demotion request at any time before its effective date unless the agency has a valid reason for refusing to permit the withdrawal. *Id.* Valid reasons include, but are not limited to, administrative disruption or the hiring of a replacement. *Id.* at 494. The agency bears the burden of proving by preponderant evidence that it had such a valid reason. *Perrine v. General Services Administration*, 81 M.S.P.R. 155, ¶ 12 (1999).

¶11 Here, on October 27, 2010, the appellant stated her decision to decline the downgrade to a GS-5/6 Tax Examiner position before her demotion was effected on November 21, 2010. IAF, Tab 9, Subtab 4.6, Tab 10, Subtab 43 at 290; HT at 347-48. The agency does not dispute that the appellant changed her mind regarding her demotion and attempted to withdraw her demotion request. IAF, Tab 9 at 3. The administrative judge, however, did not address this issue below and it is unclear from the record whether the agency had any valid reasons for not allowing the appellant to withdraw her demotion request.

¶12 On remand, the administrative judge shall provide the parties with the opportunity to submit further evidence and argument regarding this question and shall determine whether the Board has jurisdiction over this appeal under this theory. If the administrative judge finds that the Board has jurisdiction over the appeal, then the agency's demotion action must be reversed because the agency failed to provide the appellant with notice of the demotion and an opportunity to respond. *See Rivas*, 57 M.S.P.R. at 495 (reversing the agency's demotion action because the agency failed to provide the appellant with notice and an opportunity to respond, thereby violating the appellant's minimum due process rights). Moreover, if the administrative judge determines that the Board has jurisdiction and reverses the action, she must also adjudicate the appellant's claims of religious discrimination and retaliation for prior EEO activity. IAF, Tab 6 at 3, 5; *see Crosby*, 74 M.S.P.R. at 105; *see also Marchese v. Department of the Navy*, 32 M.S.P.R. 461, 464 (1987) (the Board must decide a discrimination issue in a case even if the underlying action is overturned on procedural grounds).

ORDER

¶13 For the reasons discussed above, we REMAND this case to the regional office for further adjudication in accordance with this Opinion and Order.

FOR THE BOARD:

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William D. Spencer
Clerk of the Board
Washington, D.C.